Office Supreme Court, U.S.
FILED
MAR 13 1964
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. [redacted] 45

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

v.

ARTHUR LEE HURST,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STANLEY MOSK
Attorney General of the
State of California

DORIS H. MAIER
Assistant Attorney General
of the State of California

EDSEL W. HAWS
Deputy Attorney General
of the State of California
Library and Courts Building
Sacramento, California 95814

Attorneys for Petitioner

printed in CALIFORNIA OFFICE OF STATE PRINTING

TOPICAL INDEX

	Page
PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT	1
CITATIONS TO OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTE INVOLVED	3
STATEMENT	3
A. Proceedings in Federal Courts	3
B. The State Court Proceedings and Post Conviction Actions	4
C. Statement of Facts	5
REASONS FOR GRANTING THE WRIT	10
CONCLUSION	22

TABLE OF AUTHORITIES CITED

CASES

	Page
Abel v. United States, 362 U.S. 217, 4 L.Ed.2d 668, 684, 80 S.Ct. 683	12
Castillon v. United States, 298 F.2d 256	17
Commonwealth v. Myers, 199 Pa.Super. 341, 185 A.2d 806 (1962)	11
Draper v. United States 358 U.S. 307, 3 L.Ed.2d 327, 79 S.Ct. 329	17
Gaitan v. United States, 317 F.2d 494 (1963)	10, 11
Hall v. Warden, Maryland Penitentiary, 313 F.2d 483 (1963), cert.den.sub nom.	10
Heinze v. Hurst, 325 F.2d 891	1
Hester v. United States, 265 U.S. 57, 68 L.Ed. 898, 44 S.Ct. 445	21
Hurst v. California, 211 F.Supp. 387	1
Hurst v. McGee, 368 U.S. 843, 7 L.Ed.2d 41, 82 S.Ct. 70	5
In re Harris, 56 Cal.2d 879, 16 Cal.Rptr. 889, 366 P.2d 305	11, 13
In re Leyva, 136 Cal.App.2d 750, 289 P.2d 271	13
Ker v. California, 374 U.S. 23, 10 L.Ed.2d 726, 83 S.Ct. 1623	3, 16, 17, 21
Mapp v. Ohio, 367 U.S. 643, 6 L.Ed.2d 1081, 81 S.Ct. 1684	2, 3, 4, 10, 11, 12, 13
Moore v. State, 41 Ala.App. 657, 146 So.2d 734	11
Peppersack v. Hall, 374 U.S. 809 (1963)	10
People v. Amado, 167 Cal.App.2d 345, 334 P.2d 254	21
People v. Bly, 191 Cal.App.2d 352, 12 Cal.Rptr. 542	21
People v. Bradley, 152 Cal.App.2d 527, 314 P.2d 108	17
People v. Cahan, 44 Cal.2d 434, 282 P.2d 905	12
People v. Escobosa, 179 Cal. App.2d 751, 3 Cal.Rptr. 917	21
People v. Hen Chin, 145 Cal.App.2d 583, 303 P.2d 18	21
People v. Hurst, 183 Cal.App.2d 379, 6 Cal.Rptr. 483	2, 4, 5
People v. Michael, 45 Cal.2d 751, 290 P.2d 852	18
People v. Muller, 182 N.E.2d 99 (N.Y. 1962)	11
People v. Prewitt, 52 Cal.2d 330, 341 P.2d 1	16
People v. Reed, 210 Cal.App.2d 80, 26 Cal.Rptr. 428	21
People v. Soto, 144 Cal.App.2d 294, 301 P.2d 45	17
Petition of Dirring, 183 N.E.2d 300 (Mass.1962)	11

CASES

	Page
Polk v. United States, 291 F.2d 230	21
Rodgers v. United States, 267 F.2d 79	17, 20
United States ex rel Angelet v. Fay, 63 Civ. 1457 (S.D.N.Y.)	11
United States ex rel Emerick v. Denno, 220 F.Supp. 890 (S.D.N.Y., 1963)	11
United States v. McKay, 283 F.2d 399	17
United States v. Mont, 306 F.2d 412	20
United States v. Polk, 201 F.Supp. 555	21
United States v. Walker, 323 F.2d 11	11
Willson v. Superior Court, 46 Cal.2d 291, 294 P.2d 36	16, 17

CODES

Calif. Penal Code § 836	3
28 U.S.C. § 1254(1)	2
28 U.S.C. § 2255	10, 11

CONSTITUTIONS

United States Constitution, Fourth Amendment	3, 4, 16, 21, 22
United States Constitution, Fourteenth Amendment	3, 4, 16, 21, 22

MISCELLANEOUS

Mapp v. Ohio at Large in the Fifty States, 1962 Duke L.J. 319	11

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. ---

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

v.

ARTHUR LEE HURST,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on December 19, 1963.

CITATIONS TO OPINIONS BELOW

The Memorandum Opinion of the United States District Court, Northern District of California, Northern Division, printed in Appendix A hereto, is reported in 211 F.Supp. 387. The Opinion of the Circuit Court, printed in Appendix B hereto, is reported in 325 F.2d 891.

The Opinion of the State Court is reported in *People* v. *Hurst,* 183 Cal. App. 2d 379, 6 Cal. Rptr. 483.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 19, 1963. A petition for rehearing was filed by the Appellant, The State of California, on January 18, 1964. This petition was denied January 27, 1964.

Upon application of Appellant, the Circuit Court of Appeals, on January 30, 1964, entered its order staying issuance of mandate pending the filing of, consideration and disposition by this Court of appellant's petition for writ of certiorari on or before March 16, 1964, said order further providing that if certiorari is granted, the stay is to continue pending final disposition of the case by this Court. A copy of the stay order is printed in Appendix C hereto.

The jurisdiction of this Court is invoked under 28 U.S.C., section 1254(1).

QUESTIONS PRESENTED

Does the decision in *Mapp* v. *Ohio,* 367 U.S. 643, 6 L.Ed.2d 1081, 81 S.Ct. 1684, require its retroactive application by a federal court in a collateral attack on a state court judgment which was final having been affirmed on a direct appeal prior to June 19, 1961, the date of the decision in *Mapp*?

The second question presented is whether the search and seizure of the narcotic contraband was lawful as

an incident to a lawful arrest, and in this connection whether the decision below denies to this State the right as guaranteed by *Ker* v. *California*, 374 U.S. 23, 10 L.Ed.2d 726, 83 S.Ct. 1623, of developing workable rules governing arrests, and searches and seizures.

STATUTE INVOLVED

The California statute involved is section 836 of the California Penal Code which is printed in Appendix D.

STATEMENT

A. *Proceedings in Federal Courts.*

Respondent filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California, Northern Division, on or about June 18, 1962, alleging, among other things, that his state conviction was based upon evidence obtained by an illegal search and seizure in violation of the Fourth and Fourteenth Amendments to the United States Constitution. The District Court issued an order to show cause and the State of California filed its return together with a motion to dismiss the petition including as a part thereof the state court record on appeal. On December 6, 1962, the District Court issued its memorandum and order granting the petition for writ of habeas corpus.

The District Court held that *Mapp* v. *Ohio*, 367 U.S. 643, 6 L.Ed.2d 1081, 81 S.Ct. 1684, dictated a federal or nationalized rule of search and seizure; that *Mapp* was to be given retroactive application; and that the

search and seizure of the narcotic contraband was in violation of the Fourth and Fourteenth Amendments.

The District Court issued a certificate of probable cause on December 11, 1962, and notice of appeal to the Ninth Circuit was filed on that date.

The record on appeal was timely prepared and filed with the Ninth Circuit Court of Appeals. Counsel was appointed by the court to represent respondent Hurst. Briefs were filed and the case was orally argued. The decision of the Ninth Circuit Court affirming the District Court was entered on December 19, 1963. In so doing it held that *Mapp* should be given retroactive application and that the search and seizure was in violation of the Fourth and Fourteenth Amendments.

B. *The State Court Proceedings and Post Conviction Actions*

The state court judgment resulted from Hurst's conviction for the possession of narcotics on two counts in the Los Angeles County Superior Court. The judgment was affirmed on appeal by the Second District Court of Appeal of the State of California on July 29, 1960, and is reported in *People* v. *Hurst,* 183 Cal.App. 2d 379, 6 Cal.Rptr. 483. Respondent Hurst did not file a petition for rehearing or a petition for hearing in the California Supreme Court. No petition was filed with this Court for certiorari to review the decision of the District Court of Appeal.

Respondent filed a petition for habeas corpus with the California Supreme Court, Crim. No. 6806, on

January 19, 1961, alleging that the judgment and commitment under which he was incarcerated by the State of California was illegal upon the grounds (1) that the dismissal of a prior complaint for the same offense was res judicata, and therefore the second complaint upon which the information was based constituted double jeopardy, (2) that his conviction was based upon illegally obtained evidence, and (3) that he was denied counsel of his own choice. This petition was denied without opinion by the California Supreme Court on February 23, 1961.

On March 28, 1961, respondent filed a petition for a writ of certiorari in the Supreme Court of the United States to review the order of the Supreme Court of the State of California denying the petition for habeas corpus. This office upon the request of the court filed a response to the petition. The petition for certiorari was denied on October 9, 1961, the denial being reported in *Hurst* v. *McGee*, 368 U.S. 843, 7 L.Ed.2d 41, 82 S.Ct. 70.

C. *Statement of Facts* *

At about 3:30 p.m. on May 18, 1959, Officer Garrahan of the Los Angeles Police Department received an anonymous telephone call at the Narcotics Division Office in the Police Building (RT 8).† The person on the telephone stated, "If you want to find two pounds

* The within statement of facts is substantially identical to that recited by the District Court and the Circuit Court of Appeals.

† RT refers to Reporter's Transcript in *People* v. *Hurst*, 183 Cal. App.2d 379, 6 Cal.Rptr. 483.

of marijuana look under the house at 309 West 83rd Street" and hung up (RT 8, 12-13). Garrahan testified that the voice sounded like that of a female and he had not heard it before (RT 12-13).

Garrahan related the content of the call to Officers Hanks and Grennan, and the three officers drove to the address given by the caller, 309 West 83rd Street, Los Angeles, arriving there about 4 p.m. (RT 8-9,13,15-16, 19-20). The building at that address was a single-story duplex (RT 9,28). There were two residences numbered 307 and 309 (RT 8-9,16,20,27-28).

After parking in front of the duplex the officers went directly to the residence of 309 (RT 9). Garrahan went to the front door, Hanks to the rear of the building, and Grennan to the side (RT 8-12,14,16,18, 20,27). As Garrahan approached the building, he saw a female Negro through an open window inside the house (RT 9). On reaching the front door, he knocked once, waited a few moments and knocked a second time, waited "a period of time" and knocked a third time (RT 9-10). Anniece (Hurst) Jones came to the door (RT 10). Garrahan identified himself as a police officer (RT 11). Anniece opened the door and he walked in (RT 10-11). Anniece did not tell him he could enter. He did not force his way into the house (RT 11). Anniece did not say anything until he was inside (RT 13). In the house Garrahan told Anniece the officers had information there was marijuana at the house and asked her if she would mind their looking around (RT 10). Anniece said, "My husband is

not here. He will be home in about thirty minutes (Rt 10,13).

Garrahan testified that immediately after Anniece made this statement, Hanks came to a window and "yelled" that "The stuff is under the house, 'Place them under arrest'" (RT 14-15,20-21,28-31). Garrahan then placed Anniece under arrest (RT 10-11, 14-15,21).

In the meantime, Grennan, at the side of the building, was looking through a screened window into the bathroom (RT 16). He heard Garrahan knocking on the front door and in "a matter of moments" after he heard the knocking, he saw Anniece enter the bathroom and empty something from an ashtray into the toilet and flush it (RT 16-17). He did not see what she flushed down the toilet (RT 17). He immediately "stated in a loud voice" that Anniece had flushed something down the toilet, walked around to the front of the house and went in (RT 16-19). As he entered he heard Hanks calling in the rear window that the stuff was under the house, "place them under arrest" (RT 17). He then heard Garrahan tell Anniece she was under arrest (RT 17-18). He did not see what Hanks did at the rear of the house (RT 18). He did not recover anything from the toilet (RT 19).

When Hanks reached the rear of the house he noticed that the screen was off a "vent hole" underneath the bedroom window of 309 (RT 20). As he approached the vent he heard Sergeant Grennan state something had been flushed down the toilet (RT 20). The vent hole was about 12 to 14 inches long and about

8 inches wide (RT 28). About 6 inches inside the hole he saw a large brown package (RT 20,29). He could "readily" see it standing outside (RT 19-21,28-29). He reached under the house and got the package (RT 29-30). The package was about a foot and a half long and 6 to 8 inches in diameter (RT 21). He felt it and could feel a weedy, leafy material inside (RT 20,21). He immediately knocked on the rear window and told Garrahan "the stuff is under the house, place them under arrest" (RT 17,21,30).

Officer Hanks then entered the house and searched it. In a purse which was on top of a dresser in the bedroom he found a bag which contained numerous green seeds, three packages of cigarette papers and a gas bill made out to defendant at 309 West 83rd Street (RT 21-22,25). He found another purse which Anniece said was hers which contained two green seeds lying loose on the bottom (RT 22,25). He also found two hypodermic needles and an eye dropper wrapped in a piece of paper in a "poker chip box" (RT 22,26).

Respondent Hurst arrived at the house in a Ford about 4:45 p.m. (RT 22). As he walked toward the front door, Grennan and Hanks stepped out, identified themselves, and asked him who he was (RT 22). Respondent said he was Arthur Hurst (RT 22). He was immediately placed under arrest (RT 22,31). Hanks searched the car and under the dashboard on the driver's side he found one brown paper cigarette (RT 22-23,25).

Officer Grennan had a conversation in the house with respondent in which respondent stated he did not

know anything about any marijuana being in the house or underneath it; he knew the two needles had been in the house, they belonged to a couple of friends of his up north; he had been "to the joint twice, once for marijuana and once for heroin"; he knew what it was all about but none of the "stuff" they found belonged to him; he did not know anything about the cigarette found in the car, he did not "know how it could have got there" (RT 34,39-40).

The package found under the house was covered by two brown paper bags covering two plastic bags which in turn covered a large gray pillowcase (RT 20,23,24). It contained 20 grams of heroin, four pounds of marijuana and a hypodermic outfit (RT 37-38). The seeds found in the purses were marijuana (RT 37-38). The cigarettes found in the house and in the car contained marijuana (RT 37-38). The items mentioned were admitted in evidence over respondent's appropriate and timely objections to their admission which were overruled (RT 45,48,50-52). The officers had neither a search warrant nor a warrant for respondent's arrest (RT 11-12).

Both respondent and Anniece (Hurst) Jones took the witness stand in their own behalf. Anniece testified that her last name was really "Jones" and that she had been living with respondent as his wife (RT 52-53, 72-73). She stated that she knew nothing of the narcotics found in or under the house. When questioned about the two purses found on the dresser, she stated that they belonged to her but that she had not used

them in the "recent . . . days prior to May 18th." Anniece also testified that she had not seen any sort of a small brown cigarette in respondent's car and that she "hardly ever" drove the car. She denied telling the police officers that she had gotten the marijuana in Oceanside (RT 52-66).

Respondent testified that he "held down" two jobs, one as manager of a warehouse during the day and the other as manager of a skating rink during the evening (RT 66-67). According to respondent, the first job paid over a "hundred" per week and the second $80.00 per week (RT 67-68). Respondent denied knowing anything about the narcotics found in his car (RT 68-69,70).

REASONS FOR GRANTING THE WRIT

1. The decision of the Court below held that *Mapp* should be retroactively applied. This decision is in direct conflict with the holding in other circuits on this subject. This conflict was recognized by the Court below.

The Fourth Circuit in *Hall* v. *Warden, Maryland Penitentiary,* 313 F.2d 483 (1963), cert. den. sub nom.; *Peppersack* v. *Hall,* 374 U.S. 809 (1963), held that *Mapp* does apply retroactively in a habeas corpus proceeding.

The Tenth Circuit in *Gaitan* v. *United States,* 317 F.2d 494 (1963), held that *Mapp* was prospective. In *Gaitan,* relief was denied in a proceeding under 28

U.S.C., section 2255, concerning pre-*Elkins* and pre-*Mapp* "silver platter" evidence.

The 5th Circuit in *United States* v. *Walker,* 323 F. 2d 11, a habeas corpus proceeding involving a pre-*Mapp* state court conviction denied relief and followed *Gaitan* decision insofar as it held that *Mapp* was prospective in operation[1].

The highest courts of several states have held that *Mapp* should not be applied retroactively. (*Moore* v. *State,* 41 Ala.App. 657, 146 So.2d 734 (1962); *Petition of Dirring,* 183 N.E.2d 300 (Mass.1962); *People* v. *Muller,* 182 N.E.2d 99 (N.Y. 1962); *Commonwealth* v. *Myers,* 199 Pa.Super. 341, 185 A.2d 806 (1962). See Traynor, *Mapp* v. *Ohio at Large in the Fifty States,* 1962 Duke L.J. 319.)

The concurring opinion of Justice Traynor in the California Supreme Court case of *In re Harris,* 56 Cal.2d 879, 16 Cal.Reptr. 889, 366 P.2d 305, concluded that the issue of the use of unconstitutionally obtained evidence to secure a conviction could not be raised on collateral attack by habeas corpus in California in view of the history and purposes of the exclusionary rule. The reasons for not giving *Mapp* retroactive application as stated by Justice Traynor are that the use of illegally seized evidence has no bearing on the issue of guilt and the collateral attacks on final judgments

[1] Federal district courts are equally in conflict. *United States* ex rel *Emerick* v. *Denno,* 220 F.Supp. 890 (S.D.N.Y., 1963), held that the Mapp rule would not be applied retroactively to state convictions. The case is now pending on appeal in the Second Circuit along with *United States* ex rel *Angelet* v. *Fay,* 63 Civ. 1457 (S.D.N.Y.), involving the same issue.

would be disruptive of the orderly administration of justice. See *Abel* v. *United States,* 362 U.S. 217, 4 L.Ed.2d 668, 684, 80 S.Ct. 683.

The question of the retroactive application of *Mapp* is an important one to the State of California in the administration of criminal justice. The Circuit Court of Appeals stated in its opinion th[illegible] in view of this State's judicially imposed exclusionary rule since the 1955 case of *People* v. *Cahan,* 44 Cal.2d 434, 282 P.2d 905, that it was "inclined to the belief that reversal of past California convictions will more likely be the exception rather than the rule of retroactive applications of the *Mapp* principles." Petitioner totally disagrees with such a conclusion. No statistical data is available upon which to make a prediction as to the number of California state prisoners that may avail themselves of the *Mapp* doctrine if retroactively applied. However, it is the firm conviction of the California Attorney General's Office that retroactive application of *Mapp* will bring forth many assaults upon past convictions in this State and thus will be disruptive of the orderly administration of justice.

It is to be noted that California adopted the exclusionary rule as a rule of evidence by its decision in *Cahan.* Thus, California refused to entertain a collateral attack by habeas corpus or other post-conviction remedies upon the theory that the rule against conviction by the use of illegally secured evidence is a rule of evidence only and not a question of constitutional law. Allegations contained in a collateral attack

that a conviction resulted by the use of such evidence would not be considered by the courts of this State (*In re Leyva*, 136 Cal.Ap.2d 750, 289 P.2d 271). Justice Traynor in *Harris*, recognized that the exclusionary rule since *Mapp* rests upon a constitutional basis. Therefore neither state courts nor federal courts may now refuse to entertain a collateral attack on a conviction secured by the use of unconstitutionally obtained evidence upon the sole ground that only the violation of a rule of evidence is involved. Thus it can be seen that in this State as in others the retroactive application of the *Mapp* doctrine will result in the filing of innumerable applications for writs of habeas corpus based upon the ground that convictions resulted by the use of unconstitutionally seized evidence.

This office agrees with the proposition that increased litigation and its attendant burdens is not a sufficient reason for denying relief. However, the retroactive application of *Mapp* would in no way serve the purposes for which the exclusionary rule was created. The reasons for not applying *Mapp* retroactively are well stated by Justice Traynor in *Harris* as follows:

> "If the violation of a petitioner's constitutional rights by the use of illegally seized evidence had any bearing on the issue of his guilt, there should be no doubt that habeas corpus would be available. Unlike the denial of the right to counsel, the knowing use of perjured testimony or suppression of evidence, the use of an involuntary confession, or as in this case, the denial of an opportunity to pre-

sent a defense, the use of illegally seized evidence carries with it no risk of convicting an innocent person. The purpose of the exclusionary rule is not to prevent the conviction of the innocent, but to deter unconstitutional methods of law enforcement. (*Elkins* v. *United States,* 364 U.S. 206, 217 [80 S.Ct. 1437, 4 L.Ed.2d 1669]; *Walder* v. *United States,* 347 U.S. 62, 64-65 [74 S.Ct. 354, 98 L.Ed. 503]; *Mapp* v. *Ohio, supra,* 81 S.Ct. 1684, 1688; *People* v. *Cahan, supra,* 44 Cal.2d 434, 443, 445; *People* v. *Martin,* 45 Cal.2d 755, 760 [290 P.2d 855].) That purpose is adequately served when a state provides an orderly procedure for raising the question of illegally obtained evidence at or before trial and on appeal. The risk that the deterrent effect of the rule will be compromised by an occasional erroneous decision refusing to apply it is far outweighed by the disruption of the orderly administration of justice that would ensue if the issue could be relitigated over and over again on collateral attack.

"Even if we were to limit the area of collateral attack to cases in which the facts were not disputed or to require that the facts be determined from the record on appeal viewing the evidence in the light most favorable to the prosecution, repetitious attacks on final judgments would not be eliminated. The law of search and seizure has not been static. The United States Supreme Court has only recently relaxed the requirements of standing to challenge the use of illegally obtained evidence (*Jones* v. *United States,* 362 U.S. 257, 261-267 [80 S.Ct. 725, 4 L.Ed.2d 697]; *cf., People* v. *Martin, supra,* 45 Cal.2d 755, 759-761) and abandoned the

rule that evidence illegally seized by state officers is admissible in federal courts. (*Elkins* v. *United States, supra,* 364 U.S. 206.) If collateral attack was permissible, such changes would invite fresh attacks on final judgments affirmed on appeal under the preexisting rules or on judgments from which appeals were excusably not taken in view of the apparent state of the law. Moreover, if such changes reflected refinements and improvements in constitutional law that went to the correct determination of guilt itself, one would indeed be reluctant to deny their benefits to persons claiming that they had been convicted of crimes they did not commit through the denial of rights now determined to be of constitutional magnitude. Such changes, however, like the exclusionary rule itself have no bearing on the issue of guilt, and it is therefore easily understandable why the lower federal courts have consistently adhered to the rule that the question of unconstitutionally seized evidence may not be raised on collateral attack. (*United States* v. *Zavada,* 291 F.2d 189, 191; *Jones* v. *Attorney General of the United States,* 278 F.2d 699, 701; *Alexander* v. *United States,* 290 F.2d 252, 254; *Plummer* v. *United States,* 260 F.2d 729, 730; *Wilkins* v. *United States,* 103 App.D.C. 322 [258 F.2d 416]; *United States* v. *Scales,* 249 F.2d 368, 370; *Barber* v. *United States,* 197 F.2d 815; *Fowler* v. *Hunter,* 164 F.2d 668, 669-670; *Fowler* v. *Gill,* 156 F.2d 565, 566; *Graham* v. *Squier,* 132 F.2d 681, 684-685; *Price* v. *Johnston,* 125 F.2d 806, 811; *Taylor* v. *Hudspeth,* 113 F.2d 825, 826.)"

2. The Court below held that reasonable and probable cause did not exist to make an arrest without a warrant and the search and seizure of the contraband not being incident to a valid arrest was invalid within the provisions of the Fourth and Fourteenth Amendments to the federal Constitution. In this connection the court also held that the observations of the police officers in looking into a bathroom window and under the house through an unscreened vent constituted an invasion of privacy and a search without the orbit of the "plain view doctrine." It is believed that these conclusions are erroneous as a matter of law under the factual situation presented by this case. If such conclusions are erroneous it necessarily follows that the decision in its application to other state cases will seriously disrupt the ordinary administration of criminal justice.

Under both California and federal law, a police officer may make an arrest without a warrant when he has reasonable cause to believe the person to be arrested has committed a felony. A reasonable search without a search warrant may be made as an incident to a lawful arrest under both federal and California law. These principles were recognized in *Ker* v. *California,* 374 U.S. 23, 10 L.Ed.2d 726, 83 S.Ct. 1623.

As a general rule under California law reasonable cause to make an arrest without a warrant cannot be predicated solely upon information given by an unreliable anonymous informer (*Willson* v. *Superior Court,* 46 Cal.2d 291, 294 P.2d 36; *People* v. *Prewitt,*

52 Cal.2d 330, 341 P.2d 1). Reasonable cause may be established in situations where the information given by the anonymous informer is corroborated by the personal observations of the officer making the arrest (*Willson* v. *Superior Court*, 46 Cal.2d 291, 294 P.2d 36; *People* v. *Bradley*, 152 Cal.App.2d 527, 314 P.2d 108; *People* v. *Soto*, 144 Cal.App.2d 294, 301 P.2d 45). Federal law on the subject of establishing reasonable cause upon information supplied by an informant is similar to California law (*Draper* v. *United States*, 358 U.S. 307, 3 L.Ed.2d 327, 79 S.Ct. 329; *United States* v. *McKay*, 283 F.2d 399; *Castillon* v. *United States*, 298 F.2d 256; *Rodgers* v. *United States*, 267 F.2d 79).

These principles clearly establish reasonable cause for the arrests in the present case. The facts show that Officer Garrahan received a telephone call from an anonymous informer who stated, "If you want to find two pounds of marijuana look under the house at 309 West 83rd Street." The officer had never heard the voice before and at this point in the factual development reasonable cause did not exist to make an arrest of persons residing at the address given by the informant.

It was the duty of the officers after receiving the information from the informant to conduct an investigation and, indeed, they would have been derelict in their duties had they failed to so do. In the development of workable rules permissible under *Ker*, the California courts have held that it is not unreasonable

for officers to seek interviews with suspects or witnesses or call upon them at their homes for such purposes (*People* v. *Michael*, 45 Cal.2d 751, 290 P.2d 852).

Responsive to the anonymous tip, three officers proceeded to the home of respondent Hurst situated at 309 West 83rd Street, the address given by the informant. The building at that address was a single story duplex, being two residences situated side by side, numbered 307 and 309. Officer Garrahan went to the front door, Officer Grennan to the side of the building, and Officer Hanks to the rear of the building. In approaching the building, Officer Garrahan saw a female Negro through an open window. He knocked on the front door. There was no response. After waiting a few moments he knocked a second time and there was no response. He again waited a period of time and knocked a third time. Codefendant Anniece Jones, the common-law wife of respondent, came to the door. Garrahan identified himself as a police officer and upon codefendant Jones' opening the door, he walked in. He was not told that he could enter but he did not force his way into the house. The codefendant did not say anything until he was inside. Officer Garrahan told codefendant Jones that the officers had information there was marijuana at the house and asked her if she would mind their looking around. Her reply was, "My husband is not here. He will be home in about 30 minutes."

Immediately after the codefendant made this statement Officer Hanks, who had gone to the rear of the

duplex, came to the window and "yelled" that "The stuff is under the house. Place them under arrest."

Officer Grennan, who had gone to the side of the building, was looking through a screen window into a bathroom. He could hear Officer Garrahan knocking on the front door. Shortly after he heard the knocking he saw the codefendant enter the bathroom, empty something from an ash tray into the toilet and flush it. He could not see what was flushed down the toilet. He immediately stated in a loud voice that something had been flushed down the toilet and then walked around to the front of the house and went in.

The observations which prompted Officer Hanks to yell out that the stuff was under the house and to place them under arrest are as follows: Upon reaching the rear of the house he noticed that a screen was off a vent hole underneath the bedroom window. The screen was alongside the vent hole. The vent hole was about 12 to 14 inches long and 8 inches wide. Approximately 6 inches inside the hole he saw a large brown package being about a foot-and-a-half long and 6 to 8 inches in diameter. He reached under the house and got the package. He felt it and could feel a weedy, leafy material. Officer Hanks immediately informed Garrahan that he had found the stuff and requested that the persons be placed under arrest.

At this point in the factual development, if not before, the information supplied by the informant had been sufficiently corroborated to constitute probable cause for the arrest of the codefendant and the subse-

quent arrest of respondent. The facts heretofore summarized would reasonably lead a prudent officer to believe a crime had been and was being committed. It is to be remembered that the anonymous informant stated that two pounds of marijuana was under the house occupied by the respondent. Prior to the arrest the officer observed a brown package under the house. In view of this information and considering all the circumstances the officer was warranted in concluding that this package did not evidence the storage of legal items and that a crime was being committed. The corroboration of the informant in the present case favorably compares with the corroboration of an informant in *Rodgers* v. *United States*, 267 F.2d 79, 86, wherein it was held that an informant known only two hours before the arrest of the appellant was sufficiently corroborated to warrant the officers in believing that a narcotic offense had been committed (*United States* v. *Mont*, 306 F.2d 412).

The Federal District Court and the Circuit Court of Appeals characterized the observations made by Officer Hanks of the package under the house as an illegal search and seizure. The facts and the law will not support this conclusion. It is well established that merely observing that which is open to view is not a search since a search implies a prying into hidden places for that which is concealed. It should be noted that the screen had been removed from the vent. The officer, in looking through the vent, could see the brown package. Such an item is not normally stored

under a house. This fact together with the officer's knowledge that marijuana is often contained in brown packages was sufficient to convince the officer of the reliability of the informant. Clearly such observation including the touching of the package by the officer was not a search or seizure within the prohibition of the Fourth and Fourteenth Amendments.

The District Court characterized the entry upon the backyard of the premises by the officers as a trespass and this reasoning appears to have been followed by the Circuit Court of Appeals. It is well established under federal and California law that the mere trespass upon the lands of another not involving an entry into a building and the observation of articles thereon do not constitute an illegal search (*People* v. *Bly*, 191 Cal.App.2d 352, 12 Cal.Rptr. 542; *People* v. *Amado*, 167 Cal.App.2d 345, 334 P.2d 254; *People* v. *Hen Chin*, 145 Cal.App.2d 583, 303 P.2d 18; *People* v. *Escobosa*, 179 Cal.App.2d 751, 3 Cal.Rptr. 917; *People* v. *Reed*, 210 Cal.App.2d 80, 26 Cal.Rptr. 428); *Polk* v. *United States*, 291 F.2d 230, 232; *United States* v. *Polk*, 201 F.Supp. 555, 558; *Hester* v. *United States*, 265 U.S. 57, 68 L.Ed. 898, 44 S.Ct. 445).

It is believed that the court below did not correctly apply the principles stated above in the resolution of this case or afford to the State of California its rights guaranteed by *Ker* of "developing workable rules governing arrest, searches and seizure to meet 'the practical demands of effective criminal investigation and law enforcement'" within the constitutional boundaries

of the Fourth and Fourteenth Amendments to the federal Constitution.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

STANLEY MOSK
Attorney General of the State of California

DORIS H. MAIER
Assistant Attorney General of the State of California

EDSEL W. HAWS
Deputy Attorney General of the State of California

Attorneys for Petitioner

APPENDIX A

Original filed Dec. 6, 1962
Clerk, U. S. Dist. Court
Docket Sacto. Bk: 62, Pg. 269.
Entered by B. E.
Date 12-10-62

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

ARTHUR LEE HURST, *Petitioner,*

vs.

The people of the State of California, ROBERT A. HEINZE, Warden, et al., *Respondents*

Civil No. 8507

MEMORANDUM AND ORDER

Petitioner has filed with this Court an application for a writ of habeas corpus, pursuant to the provisions of Title 28 U.S.C. § 2241(c)(3), seeking his release from the California State Prison at Folsom. He is presently incarcerated in said prison under a commitment of the Superior Court of the State of California, in and for the County of Los Angeles, pursuant to a conviction on two counts of violation of California Health and Safety Code § 11500 [possession of nar-

cotics other than marijuana] (See: *People vs. Hurst*, 183 Cal.App. 2d 379). From the record, it is clear that petitioner is a State prisoner, and is not imprisoned under any federal law.

This Court issued its order to show cause on July 30, 1962, based upon the facts alleged in petitioner's application. Pursuant to said order the State of California, through its representative the Attorney General, has filed a reply. Petitioner has filed a traverse thereto. A recitation of the facts in this case, as found by the State courts, is appropriate at this point.

At about 3:30 p.m. on May 18, 1959, Officer Garrahan of the Los Angeles Police Department received an anonymous telephone call at the Narcotics Division office in the Police Building. The person on the telephone stated, "If you want to find two pounds of marijuana, look under the house at 309 West 83d Street," and hung up. Garrahan testified that the voice sounded like that of a female, and that he had not heard it before.

Garrahan, along with Officers Hanks and Grennan, drove to the above address. The building there located was a single-story duplex, with two residences, numbered 307 and 309.

After parking in front of the duplex, the officers went directly to the residence at 309, whereupon they dispersed to appropriate locations surrounding it. Garrahan went to the front door; Hanks went to the rear of the building; and Grennan, to the side. As Garrahan approached the building, he saw a female

through an open window, inside the house. On reaching the front door he knocked once, waited a few moments and knocked a second time, waited a period of time and knocked a third time. Anniece Jones (petitioner's co-defendant and common-law wife) then came to the door. Garrahan identified himself as a police officer. Anniece opened the door and he entered. Anniece did not refuse him permission to do so. He did not force his way into the house. Anniece did not say anything until he was inside. Once, inside, Garrahan told Anniece that the officers had information that there was marijuana at the house and asked her if she would mind their looking around. Anniece replied, "My husband is not here. He will be home in about thirty minutes."

During this period of time, Grennan, at the side of the building, was looking through a screened window into the bathroom. He heard Garrahan knocking on the front door, and immediately saw Anniece enter the bathroom and empty something from an ashtray into the toilet and flush it. He did not, however, see what she flushed down the toilet. He immediately stated in a loud voice that Anniece had flushed something down the toilet, walked around to the front of the house, and went inside.

During this same period of time, Hanks was at the rear of the house, where he noticed that the screen was off a "vent hole" underneath the bedroom window of 309, and was alongside said hole. The vent hole was about 12 to 14 inches wide and about eight inches

high. About six inches inside the hole he saw a large brown package. He could "readily" see it, standing outside. He reached under the house and got the package, which was about a foot and a half long and six to eight inches in diameter. There were two brown paper bags inside, covering two plastic bags which, in turn, covered a large gray pillowcase. He felt of the pillowcase and felt "a weedy, leafy material" inside one of the bags. He immediately knocked on the rear window and told Garrahan, "The stuff is under the house; place them under arrest."

In the second bag there were two "condoms" containing a white powder, wrapped in a handkerchief. In the package there was also what looked like a "hypodermic outfit". Hanks then entered the house and conducted a thorough search of it. In a purse which was sitting on a dresser in the bedroom he found a bag which contained numerous green seeds, three packages of cigarette papers and a gas bill made out to petitioner at 309 West 83rd Street. He found another purse which Anniece said was hers, which contained two green seeds lying loose in the bottom. He also found two hypodermic needles and an eye dropper wrapped in a piece of paper in a "poker chip box".

Petitioner arrived at the house in a Ford automobile about 4:45 p.m. As he walked toward the front door, Grennan and Hanks stepped out, identified themselves, and asked him who he was. Petitioner identified himself, and was thereupon immediately placed under arrest. Hanks searched the car, and under the dash-

board on the driver's side he found one brown paper cigarette.

Officer Grennan had a conversation inside the house with petitioner in which petitioner stated he did not know anything about any marijuana in the house or underneath it. Petitioner admitted knowing that the two needles had been in the house, and claimed that they belonged to a couple of friends of his up north. Petitioner also admitted that he had been "to the joint twice, once for marijuana and once for heroin", but denied that any of the "stuff" belonged to him. He also disclaimed any knowledge about the cigarette found in the car.

The package found under the house contained 20 grams of heroin, four pounds of marijuana and a hypodermic outfit. The seeds found in the purses were marijuana. The cigarette found in the house and in the car contained marijuana. All of these items were introduced into evidence over timely and appropriate objection by petitioner. The officers had neither a search warrant nor a warrant for petitioner's arrest.

Both petitioner and Anniece took the stand in their own behalf. Their testimony consisted generally of denials of any knowledge of any of the narcotics which had been found.

Petitioner has raised three basic contentions, two of which contain no merit whatsoever. He claims, first, that he was denied the effective aid of counsel in the State court proceedings. The record demonstrates the contrary, showing that petitioner was represented by

counsel at all stages of the proceedings, extending from the preliminary examination to and including the appeal from the judgment. The question of the competeney of counsel is not reviewable on habeas corpus proceedings in the absence of such a showing of incompetence "as to make the trial a farce and mockery of justice" (*Palakiko vs. Harper,* 209 F.2d 75; and *Anderson vs. Banna,* 250 F.2d 654). Moreover, petitioner has not presented this contention to the California courts. In the absence of such a presentation, petitioner has failed to exhause his remedies on that point, and this Court has no jurisdiction to review said contention (Title 28 U.S.C. § 2254).

Petitioner also claims that he has been subjected to double jeopardy. The apparent basis for such contention is that petitioner was originally charged with a violation of Health and Safety Code § 11500 [possession of marijuana], and that said complaint was dismissed at the preliminary hearing, after which the complaint upon which petitioner's present conviction rests was filed. The apparent basis for said dismissal was the fact that possession of marijuana was, at that time, prohibited not by § 11500, but by § 11530 of the California Health and Safety Code. Not only has petitioner failed to present this argument to the California courts on appeal, therefore preventing either this Court or the California courts from considering said point on habeas corpus proceedings (Title 28 U.S.C. § 2254, and *In re Dixon,* 41 Cal.2d 756), but the substantive point raised by petitioner is itself incorrect.

Jeopardy does not attach, under California law, until a defendant has been placed on trial before a court of competent jurisdiction upon a valid indictment or information before a jury duly impaneled and charged with his deliverance (*Jackson vs. Superior Court*, 10 Cal.2d 350). The dismissal of the original complaint at the preliminary hearing did not operate as res judicata (See: *People vs. Prewitt*, 52 Cal.2d 330).

The more substantial point raised by petitioner relates to the allegedly illegal search and seizure proceedings prior to his arrest. The importance of said point stems from the recent decision of the United States Supreme Court in *Mapp vs. Ohio*, 367 U.S. 643, by which the exclusionary rule, previously applied only to the Federal Government under the terms of the Fourth Amendment (*Wolf vs. Colorado*, 338 U.S. 25), was held applicable to the States as well. For purposes of the instant petition, however, *Mapp* is significant for what it says by implication, rather than expressly. Two points arise in connection with petitioner's petition.

1. It appears to this Court that the logical interpretation of *Mapp* is that the Fourth Amendment has now been incorporated into the Fourteenth Amendment, and that the law of search and seizure has now been nationalized. The specific holding of *Mapp*, which leads this Court to the above conclusion, is that,

> "Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth,

it is enforceable against them by the same sanction of exclusion as is used against the Federal Government." (367 U.S. at 655)

Justice Clark also spoke of "extending the substantive protections of due process to all constitutionally unreasonable searches—state or federal." (367 U.S. at 655). As one writer has stated,

> "Since there is only one fourth amendment, there seemingly can be only one interpretation: the Supreme Court should logically supervise interpretation of a federal right. . . . These statements, as well as several others, seem to imply that uniformity is both necessary and desirable; that federal and state courts and officers have a "mutual obligation to respect the same fundamental criteria in their approaches.' " Collings, *Toward Workable Rules of Search and Seizure—An Amicus Curiae Brief*, 50 Calif.L.Rev. 421, at 424.

See also: Broeder, *The Decline and Fall of Wolf v. Colorado*, 41 Neb.L.Rev. 185; Morris, *The End of an Experiment in Federalism—A Note on Mapp v. Ohio*, 36 Wash.L.Rev. 407; Weinstein, *Local Responsibility for Improvement of Search and Seizure Practices*, 34 Rocky Mt. L. Rev. 150; and *Note*, 35 So.Cal.L.Rev. 64.

Parenthetically, it is interesting to note that varying interpretations of the *Mapp* decision have been set forth by law review writers, and that the interpretations appear to coincide generally with the extent to which the particular State courts have implemented their own rules of search and seizure. Particularly significant is the fact that California authors (in a

State which has had extensive experience with the laws of search and seizure, particularly since the 1955 decision of *People vs. Cahan,* 44 Cal. 2d 434) support a narrow reading of the *Mapp* case, whereas authors from States in which little State activity has been undertaken to define the permissible areas of search and seizure have been particularly outspoken in their expansive interpretation of *Mapp.* It would appear that a State's own prior decisions tend to color one's reaction to decisions of the United States Supreme Court.

It cannot fairly be said, however, that the *Mapp* decision stands in a vacuum, with reference to an apparent policy of the Supreme Court to establish a national search and seizure law. Indeed, that Court, in *Elkins vs. United States,* 364 U.S. 206, at 223-224, specifically stated that,

> "In determining whether there has been an unreasonable search and seizure by state officers, a federal court must make an independent inquiry, whether or not there has been such an inquiry by a state court, and irrespective of how any such inquiry may have turned out. The test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed."

Although the *Elkins* case dealt with the use of illegally obtained evidence in a Federal proceeding, where the evidence had been acquired by the actions of a State officer, the decision in *Mapp* seems to have abolished whatever significance such a distinction might have.

It is clear that mere probable cause for belief that certain articles subject to seizure are in a dwelling cannot, of itself, justify a search without a warrant (*Chapman vs. United States*, 365 U.S. 610, 613; *Jones vs. United States*, 357 U.S. 493, 497; *Agnello vs. United States*, 269 U.S. 20; and *United States vs. Catalanotte*, 208 F.2d 264). Since the officers in this situation did not have a warrant, the only possible basis for their search of the premises at 309 must have been as an incident of the arrest of Anniece and petitioner. Nothing which would cause this case to come within the "exceptional circumstances" rule of *Johnson vs. United States*, 333 U.S. 10, is made to appear.

The language of *Elkins, supra*, attains decisive significance in the instant situation, in view of the present status of the Federal law of search and seizure. That law requires (with an exception, not here material, involving moving vehicles; See: *Husty vs. United States*, 282 U.S. 694; and *Busby vs. United States*, 296 F.2d 328) that an arrest be made prior to any search of a defendant or of the area under his possession or control, in order that such search be considered as incident to the arrest (*Mosco vs: United States*, 301 F.2d 180; *United States vs. Paroutian*, 299 F.2d 486; *Lee vs. United States*, 232 F.2d 354; *Walker vs. United States*, 225 F.2d 447; *Papani vs. United States*, 84 F.2d 160; *United States vs. Royster*, 204 F.Supp. 760; *United States vs. Rutheiser*, 203 F.Supp. 891; and see *Rios vs. United States*, 364 U.S. 253; and *United States vs. Rabinowitz*, 339 U.S. 56). The Cali-

fornia rule, on the other hand, appears to sanction searches as incident to an arrest even if the search occurs prior to the actual arrest, as long as there was, in fact, probable cause to have made an arrest prior to the making of the search (*People vs. Ingle,* 53 Cal.2d 407; *Willson vs. Superior Court,* 46 Cal.2d 291; and *People vs. Simon,* 45 Cal.2d 645).

The logic and language of *Mapp* and *Elkins, supra,* do not, in my opinion, permit the continuation of this California rule. Although the California courts have reached an opposite conclusion (*People vs. Tyler,* 193 Cal.App.2d 728, 734), I find it impossible to rationalize the use of two conflicting types of search incident to arrest, in the face of "the same sanction of exclusion" and a "mutual obligation to respect the same fundamental criteria" in this area. If, in fact, in "determining whether there has been an unreasonable search and seizure by state officers . . . [t]he test is one of federal law," as is noted by *Elkins, supra,* I see no legal basis for permitting a search, as incidental to an arrest, to precede that arrest, no matter how appealing the practicalities of the situation might appear. This conclusion, of course, excepts the above-noted "exceptional circumstances" rule of *Johnson.* Having reached this conclusion, it becomes incumbent upon me to examine the factual situation pertaining to the arrest here involved.

The California District Court of Appeal stated what it considered to be the main question herein as follows:

"Were the observations of the officers at defendant's [petitioner's] home sufficient to establish reasonable cause for the search?" (183 Cal.App.2d at 385)

With all deference to that learned Court, it appears to me that the decisive issue here is not whether there was reasonable cause for a search, but rather whether there was an arrest, based upon reasonable cause, before any search was undertaken. Since no search would here have been proper except as incident to an arrest (in this case, the arrest of Anniece), and since any such search must properly have followed the arrest, any search which preceded the arrest must therefore have invalidated the discoveries made thereby, and any discoveries which followed therefrom, under the "fruit of the poisonous tree" doctrine of *Silverthorne Lumber Co. vs. United States,* 251 U.S. 385, and *Nardone vs. United States,* 308 U.S. 338 (See also: *United States vs. Paroutian, supra, Cochran vs. United States,* 291 F.2d 633; *Taglavore vs. United States,* 291 F.2d 262; *Morrison vs. United States,* 262 F.2d 449; *Work vs. United States,* 243 F.2d 660; and *Lee vs. United States, supra;* and Cf. *Ramirez vs. United States,* 294 F.2d 277).

The California District Court of Appeal found there to have been reasonable cause for the arrest of Anniece, based upon a combination of the anonymous tip, the length of time elapsed before Anniece answered Garrahan's knocks at the front door, the observation by Grennan of her emptying an ashtray into a toilet

and flushing it, the assumption that if the officers had seen her she had seen them, and the fact that Hanks saw the package containing the narcotics under the house. That Court apparently did not consider the entry of the officers onto petitioner's land and the resultant observation of Anniece through the bathroom window, the observation of the package by Hanks, his reaching in and removing the package, the opening thereof, and the resultant discovery of the narcotics, to have been a search. I disagree, for two reasons.

First, the Fourth Amendment has been construed by the Federal Courts to afford protection to an enclosed back yard (*Hobson vs. United States,* 226 F.2d 890; and see *Polk vs. United States,* 291 F.2d 230). Spying through a transom from a common hallway after breaking into a rooming house has been held a violation of the Fourth Amendment (*McDonald vs. United States,* 335 U.S. 451). Standing on a man's premises and looking into his bedroom window has been held to be proscribed by the Fourth Amendment (*Brock vs. United States,* 223 F.2d 681), and so had searching a locked cupboard in a common hallway (*United States vs. Lumia,* 36 F.Supp. 552). On the basis of the above state of the law, certain language in such California cases as *People vs. Martin,* 45 Cal.2d 755 [allowing officers to look through a window or a mail chute, and to act upon what they see thereby] becomes at least questionable. Although it is clear that a mere trespass will not invalidate evidence which is discovered in plain sight during such trespass (*Mosco vs. United*

States, supra; and *Teasley vs. United States,* 292 F.2d 460), the instant case involved, in addition to the trespass, observation of an individual through a bathroom window (It may be that, under the recent California decisions, bathrooms and toilets are peculiarly protected, and that therefore this observation would constitute an illegal search even under California law, See: *Britt vs. Superior Court,* 58 A.C. 480; and *Bielicki vs. Superior Court,* 57 Cal.2d 602), and the removal and opening of a package from underneath a house. This combination is sufficient to constitute an unreasonable search, under Federal law, which now appears to be applicable to the States.

Second, specifically as to the removal and opening of the package, and the discovery of the narcotics thereby, it should be noted that it was only upon the discovery of "the stuff" that Hanks shouted for Garrhan to arrest Anniece. The District Court of Appeal noted that discovery of the package was one of the bases for its finding of probable cause. The discovery of the package, however, was not the last event before the actual arrest of Anniece. Subsequent to said discovery, the package was opened, and the narcotics themselves were discovered. It is inconceivable that the opening of a package which had been concealed in a vent hole under a house would not be considered a search. Since the old California rule that a search, incident to an arrest, may precede the actual arrest if there is in fact probable cause for said arrest, can no longer be accepted, it becomes clear that the search

by which the narcotics in the package were discovered violated the Fourth Amendment.

Moreover, the facts appear to warrant the conclusion that it was the discovery of the "woody, leafy material" inside the package that actually triggered the arrests in this case. All that appeared from the outside of the house, in back, was a large brown package. The only prior information which might have led the officers to believe that this package contained narcotics was the anonymous tip. Such a tip, alone, clearly provides no basis for an arrest, or a search incident thereto, either under Federal law or California law (*Cochran vs. United States, supra; Wong Sun vs. United States,* 288 F.2d 366; *Rodgers vs. United States,* 267 F.2d 79; *Cervantes vs. United States,* 263 F.2d 800; *Hobson vs. United States, supra; Wrightson vs. United States,* 222 F.2d 556; *Contee vs. United States,* 215 F.2d 324; *Worthington vs. United States,* 166 F.2d 557; *Willson vs. Superior Court, supra;* and *People vs. Kitchens,* 46 Cal.2d 260). Any further positive information as to the existence of narcotics on the premises at 309 came from their discovery by Hanks. Since "a search is not to be made legal by what it turns up" (*Miller vs. United States,* 357 U.S. 301, 312; and *United States vs. Di Re,* 332 U.S. 581, 595), the actual discovery of the narcotics by Hanks cannot be used to support a finding of probable cause.

To recapitulate, even assuming, *arguendo,* that probable cause for the arrest of Anniece existed before Hanks' discovery of the narcotics, said discovery can

no longer be incident to the arrest. And if Hanks' discovery furnished the basis for the probable cause, the arrest was based on an illegal search, and cannot be upheld.

It should also be noted that the above determination has no necessary effect upon the existing rule that the lawfulness of the arrest without a warrant is to be determined by reference to State law (See: *Johnson vs. United States, supra; United States vs. Di Re, supra; Burks vs. United States,* 287 F.2d 117; and *Butler vs. United States,* 273 F.2d 436). California Penal Code § 836 specifically provides that arrests without a warrant may be made by an officer "[w]henever he has reasonable cause" for certain beliefs. Subdivision 2 of that section, allowing an arrest when the arrestee has in fact committed a felony, also has been construed to require a showing of reasonable cause (*People vs. Brown,* 45 Cal.2d 640). The instant situation does not specifically involve the question of whether there was a valid arrest. It is, rather, concerned with whether, assuming there was a valid arrest, the searches undertaken were incident thereto.

Looking, then, to the searches by Hanks of the house and of petitioner's automobile, it must also be held that said searches violated the requirements of the Fourth Amendment. If there was, in fact, no probable cause for the arrest until after the discovery of the narcotics in the package, the succeeding arrest was merely incident to that search, under the law which has been applied both by the Federal and the Cali-

fornia Courts. As such, the arrest itself cannot support any further searches. Even if, however, the arrest was valid under California law, as being based on reasonable cause prior to Hanks' discovery (I am inclined to doubt the propriety of this conjecture, but the District Court of Appeal, in its decision, left the true basis for the arrest unclear.), the preceding search tainted any subsequent search which might, at that time, be attempted as incident to the arrest (*United States vs. Paroutian, supra; Taglavore vs. United States, supra;* and see *Silverthorne Lumber Co. vs. United States, supra*). The controlling rule is succinctly stated in *United States vs. Paroutian, supra,* at page 489, as follows:

> "[A] showing that the government had sufficient independent information available so that in the normal course of events it might have discovered the questioned evidence without an illegal search cannot excuse the illegality or cure tainted matter."

In the instant situation, as in *Paroutian,*

> "even without an unlawful search, the [officers] might have found the [narcotics]. But that is not what happened." (299 F.2d at 489)

It follows, therefore, that the narcotics discovered in the house, subsequent to the arrest of Anniece, and the cigarette discovered in petitioner's automobile, subsequent to his arrest, were discovered through the results of a search which violated the requirements of the Fourth Amendment, as that Amendment has been

incorporated into the Fourteenth Amendment of the Constitution of the United States.

2. The effects of the *Mapp* decision, inasmuch as that decision was based upon an apparent constitutional necessity, must be given retroactive effect. Although I am aware of a specific holding to the contrary (*Hall vs. Warden, Maryland Penitentiary,* 201 F.Supp. 639), it would appear that the Supreme Court itself has at least intimated that such is to be the result of any decision in which that Court reverses the pre-existing law on constitutional grounds. This general result was reached in *Griffin vs. Illinois,* 351 U.S. 12, by four members of the majority (Justice Frankfurter, concurring, specifically argued against such a construction), and was reaffirmed by six members of the Court in *Eskridge vs. Washington State Board of Prison Terms and Paroles,* 357 U.S. 214. The *Mapp* decision itself cited *Griffin* with approval, in connection with the argument that a wholesale release of State prisoners would follow from that decision (*Mapp vs. Ohio,* 367 U.S. at 659, n.9). I do not ascribe the significance to the use of the words "then," "today" and "no longer" in the *Mapp* case that has been given them by Judge Thomsen in *Hall vs. Warden, Maryland Penitentiary, supra.* For me, the question of the retroactivity of constitutional pronouncements is itself a constitutional question, to be decided by what the Supreme Court has actually done, rather than by the happenstance of language that it may have used in so doing.

The above conclusion brings us to two procedural problems. First, is the question of an illegal search and seizure cognizable by the Federal Courts on an application for a writ of habeas corpus? Prior to *Mapp,* the question of the propriety of searches and seizures by State officers was a question solely of evidence in California, and, as pointed out by Justice Traynor, concurring, in *In re Harris,* 56 Cal.2d 879, at 884,

> ". . . the lower federal courts have consistently adhered to the rule that the question of unconstitutionally seized evidence may not be raised on collateral attack. [citations]"

Although in most of the cases in which the courts have refused to review, on habeas corpus, questions of illegal search and seizure, the petitioners had filed to otherwise exhaust their remedies, the basic theory behind such refusal was that such a question was merely one of evidence, to be determined solely on appeal. Habeas corpus was looked upon solely as a device for attacking the jurisdiction of the trial court (*Whelchel vs. McDonald,* 340 U.S. 122; and *Eagles vs. United States ex rel. Samuels,* 329 U.S. 304). The *Mapp* case, however, has changed the nature of the inquiry into any allegedly illegal search and seizure. No longer is a mere question of evidence involved. The right to be free of unreasoanble invasions of one's privacy has assumed the same constitutional status as the right to counsel and the right to suppress involuntary confessions (See, e.g., *Rodgers vs. Richmond,* 365

U.S. 534; *Moore vs. Michigan,* 355 U.S. 155; and *Leyra vs. Denno,* 347 U.S. 556). Said right is now to be enforced with the same strictness as are any other constitutional rights. Were the opposite to prevail, as hypothesized in *Mapp* (367 at page 656),

> "[t]he right to privacy, no less important than any other right carefully and particularly reserved to the people, would stand in marked contrast to all other rights declared as 'basic to a free society.'"

I conclude, therefore, that questions involving the legality of a search and seizure, by State officers in a State prosecution, are now properly subject to inquiry by Federal courts through the proper habeas corpus procedures.

Second, although petitioner has exhausted his remedies, as required by Title 28 U.S.C. § 2254, has he waived the right to present the issue of the legality of the search and seizure, here involved, on habeas corpus? Petitioner took an appeal from the judgment of the Los Angeles Superior Court, which judgment was affirmed by the Second District Court of Appeal on July 29, 1960 (See: *People vs. Hurst, supra*). No timely petition for rehearing, or for a hearing in the California Supreme Court, was filed, nor was there filed a petition for certiorari to review the decision of the District Court of Appeal. Subsequently, petitioner, on January 19, 1961, filed a petition for a writ of habeas corpus with the California Supreme Court, setting forth the same search and seizure points here presented. Said petition was denied without opinion on

February 23, 1961. On March 28, 1961, petitioner filed a petition for a writ of certiorari in the Supreme Court of the United States to review said order by the California Supreme Court. Said petition for writ of certiorari was denied on October 9, 1961 (*Hurst vs. McGee,* 368 U.S. 843). Petitioner, therefore, has presented his present search and seizure argument to all of the California appellate courts and to the United State Supreme Court. Said presentation, however, was not taken by direct appeal, but rather was a collateral attack through the device of the writ of habeas corpus.

The answer to this question would seem apparent, that no such waiver had occurred, for the reasons set forth in the answer involving the cognizability of the issue of search and seizure on habeas corpus, were it not for footnote 9 of the *Mapp* opinion. That footnote reads as follows:

> "As is always the case, however, state procedural requirements governing assertion and pursuance of direct and collateral constitutional challenges to criminal prosecutions must be respected. We note, moreover, that the class of state convictions possibly affected by this decision is of relatively narrow compass when compared with [certain cited cases]. In those cases the same contention was urged and later proved unfounded. In any case, further delay in reaching the present result could have no effect other than to compound the difficulties.

The precise meaning of said footnote is certainly unclear, but it appears that a minimal requirement

therein set forth is that State remedies be exhausted, as is provided for by § 2254 of Title 28, and that the particular constitutional issue to be presented to the Federal courts be first presented to the State courts. I do not, however, read that footnote as in any way detracting from the conclusions reached concerning the propriety of inquiry into search and seizure questions by habeas corpus proceedings.

IT IS, THEREFORE, ORDERED that petitioner's petition for a writ of habeas corpus be, and the same is, hereby granted. A writ of habeas corpus will issue, and it is ordered that petitioner be discharged from custody.

DATED: December 6, 1962.

SHERRILL HALBERT
UNITED STATES DISTRICT JUDGE

Received
Attorney General
Dec. 7 9 24 AN '62
Department of Justice
Sacramento Office

APPENDIX B

Docket Sacramento Bk. 62-269 Pg. _____
Date 1-3-64 By D.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The people of the State of California, ROBERT A. HEINZE, Warden, et al., *Petitioner,* *vs.* ARTHUR LEE HURST, *Respondent,*	No. 18,420 Dec. 19, 1963

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION.

Before: HAMLEY, JERTBERG and KOELSCH, Circuit Judges.

JERTBERG, Circuit Judge:

This is an appeal from an order of the district court granting relief in habeas corpus proceedings to Arthur Lee Hurst, a prisoner of the State of California. On October 8, 1959, Hurst was convicted in the Superior Court of the State of California in and

for the County of Los Angeles on two counts of possession of narcotics other than marijuana (Calif. Health and Safety Code § 11500). On appeal to the District Court of Appeal of California the conviction was affirmed. 183 Cal. App. 2d 379, 6 Cal. Rptr. 483 (July 29, 1960). A petition for habeas corpus was filed with the California Supreme Court and was denied on February 23, 1961. Appellee filed a petition for a writ of certiorari in the Supreme Court of the United States to review the order of the California Supreme Court denying habeas corpus relief. Certiorari was denied, *sub nom. Hurst v. McGee,* 368 U.S. 843, 82 Sup. Ct. 70, 7 L.Ed. 2d 41 (October 9, 1961). Appellee filed the present petition for a writ of habeas corpus in the district court on June 18, 1962. The district court granted the writ on the ground that appellee's conviction was based upon evidence obtained by an illegal search and seizure, admission of which evidence violated appellee's rights under the Fourth and Fourteenth Amendments to the United States Constitution. *Hurst v. People of the State of California,* 211 F. Supp. 387 (N.D. Cal. 1962).

Jurisdiction of the district court was invoked under the provisions of 28 U.S.C. § 2241(c)(3). Jurisdiction of this court rests in the provisions of 28 U.S.C. § 2253.

The district court's recitation of the facts is not challenged. We hereby adopt and quote that recitation from 211 F. Supp. at 389-390.

"At about 3:30 p.m. on May 18, 1959, Officer Garrahan of the Los Angeles Police Department

received an anonymous telephone call at the Narcotics Division office in the Police Building. The person on the telephone stated, 'If you want to find two pounds of marijuana, look under the house at 309 West 83d Street,' and hung up. Garrahan testified that the voice sounded like that of a female, and that he had not heard it before.

"Garrahan, along with Officers Hanks and Grennan, drove to the above address. The building there located was a single-story duplex, with two residences, numbered 307 and 309.

"After parking in front of the duplex, the officers went directly to the residence at 309, whereupon they dispersed to appropriate locations surrounding it. Garrahan went to the front door; Hanks went to the rear of the building; and Grennan to the side. As Garrahan approached the building, he saw a female through an open window, inside the house. On reaching the front door he knocked once, waited a few moments and knocked a second time, waited a period of time and knocked a third time. Anniece Jones (petitioner's codefendant and commonlaw wife) then came to the door. Garrahan identified himself as a police officer, Anniece opened the door and he entered. Anniece did not refuse him permission to do so. He did not force his way into the house. Anniece did not say anything until he was inside. Once inside, Garrahan told Anniece that the officers had information that there was marijuana at the house and asked her if she would mind their looking around. Anniece replied, 'My husband is not here. He will be home in about thirty minutes.'

"During this period of time, Grennan, at the side of the building, was looking through a screened window into the bathroom. He heard Garrahan knocking on the front door, and immediately saw Anniece enter the bathrom and empty something from an ashtray into the toilet and flush it. He did not, however, see what she flushed down the toilet. He immediately stated in a loud voice that Anniece had flushed something down the toilet, walked around to the front of the house, and went inside.

"During this same period of time, Hanks was at the rear of the house, where he noticed the screen was off a 'vent hole' underneath the bedroom window of 309, and was alongside said hole. The vent hole was about 12 to 14 inches wide and about eight inches high. About six inches inside the hole he saw a large brown package. He could 'readily' see it, standing outside. He reached under the house and got the package, which was about a foot and a half long and six to eight inches in diameter. There were two brown paper bags inside, covering two plastic bags which, in turn, covered a large gray pillowcase. He felt of the pillowcase and felt 'a weedy leafy material' inside one of the bags. He immediately knocked on the rear window and told Garrahan, 'The stuff is under the house; place them under arrest.'

"In the second bag there were two 'condoms' containing a white powder, wrapped in a handkerchief. In the package there was also what looked like a 'hypodermic outfit.' Hanks then entered the house and conducted a thorough search of it. In a purse which was sitting on a dresser in the bed-

room he found a bag which contained numerous green seeds, three packages of cigarette papers and a gas bill made out to petitioner at 309 West 83d Street. He found another purse which Anniece said was hers, which contained two green seeds lying loose in the bottom. He also found two hypodermic needles and an eye dropper wrapped in a piece of paper in a 'poker chip box'.

"Petitioner arrived at the house in a Ford automobile about 4:45 p.m. As he walked toward the front door, Grennan and Hanks stepped out, identified themselves, and asked him who he was. Petitioner identified himself, and was thereupon immediately placed under arrest. Hanks searched the car, and under the dashboard on the driver's side he found one brown paper cigarette.

"Officer Grennan had a conversation inside the house with petitioner in which petitioner stated he did not know anything about any marijuana in the house or underneath it. Petitioner admitted knowing that the two needles had been in the house, and claimed that they belonged to a couple of friends of his up north. Petitioner also admitted that he had been 'to the joint twice, once for marijuana and once for heroin', but denied that any of the 'stuff' belonged to him. He also disclaimed any knowledge about the cigarette found in the car.

"The package found under the house contained 20 grams of heroin, four pounds of marijuana and a hypodermic outfit. The seeds found in the purses were marijuana. The cigarette found in the car contained marijuana. All of these items were introduced into evidence over timely and appropriate objection by petitioner. The officers had neither a

search warrant nor a warrant for petitioner's arrest.

"Both petitioner and Anniece took the stand in their own behalf. Their testimony consisted generally of denials of any knowledge of any of the narcotics which had been found."

Under recent Supreme Court decisions it is clear that the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment render inadmissible in a state criminal trial all evidence obtained as a result of an illegal search and seizure,[1] and that the legality of a state search and seizure is to be measured, for purposes of the exclusionary rule, by the "fundamental criteria" of the Fourth Amendment.[2] Since the exclusionary rule is itself a Constitutional dictate,[3] the question of illegal search and seizure by state authorities of evidence for use in a state criminal trial is cognizable by the federal courts on application for a writ of habeas corpus,[4] unless there is a state post-conviction remedy still available to the prisoner at the time of filing the application in the federal court.[5]

The keystone question in the instant case remains unresolved by the Supreme Court: whether the *Mapp* and *Ker* cases are to be given retroactive effect where,

---

[1] *Mapp v. Ohio*, 367 U.S. 643 (1961).

[2] *Id.; Ker v. California*, 374 U.S. 23 (1963).

[3] *Mapp v. Ohio, supra*, at 655:

"We hold that all evidence obtained by searches and seizures in violation of the Constitution is, *by that same authority*, inadmissible in a state court." (Emphasis added.)

[4] See, e.g., *Rogers v. Richmond*, 365 U.S. 534 (1950 [coerced confession]; *Gaitan v. United States*, 317 F.2d 494 (10th Cir. 1963) [search and seizure].

[5] *Fay v. Noia*, 372 U.S. 391 (1963).

as here, the search, the trial, the motion to suppress, the denial thereof, the conviction, and the exhaustion or expiration of remedies of direct review occurred prior to June 19, 1961, the date of the Supreme Court's decision in *Mapp*.

The circuit courts which have passed upon the question are in disagreement. *Hall* v. *Warden, Maryland Penitentiary*, 313 F.2d 483 (4th Cir. 1963), *cert. den. sub nom. Pepersack* v. *Hall*, 374 U.S. 809 (1963), held that retroactivity follows from the notion that courts but find and declare the law which has always existed but which may have eluded discovery in previous judicial efforts. *Gaitan* v. *United States, supra,* challenged the assertion that the later decisions were always the law as departing from reality. *Gaitan* denied relief in a proceeding under 28 U.S.C. §2255 concerning pre-*Elkins*[6] and pre-*Mapp* "silver platter" evidence. In a habeas corpus proceeding involving a pre-*Mapp* state court conviction, the court in *United States* v. *Walker*, 323 F.2d 11 (5th Cir. 1963), denied relief and agreed with the *Gaitan* decision insofar as it rejected the *Hall* rationale.

The views of those who disfavor general retroactive application of *Mapp* are well presented in composite form in the *Walker* case. Briefly, the argument in that direction runs as follows: Absent both a Constitutional mandate and a clear expression of intent by the Supreme Court, determination of the question should be made by considering the impact of retroactive applica-

[6] *Elkins v. United States*, 364 U.S. 206 (1960).

tion upon furtherance of the policy objective of the new interpretation and upon the practical administration of justice. The policy objective of the new interpretation is the effective guarantee of the Fourth Amendment right by removal of the incentive to disregard it. Retroactive application of *Mapp* will not further the purpose of deterrence but will have an adverse impact upon the practical administration of justice in that the "wholesale reversal of past convictions"[7] will follow therefrom, on the basis of a rule unrelated to actual guilt, which convictions were arrived at in solemn compliance with the law of the land as it then existed under *Wolf* v. *Colorado*, 338 U.S. 25 (1949).

The problem is not strictly whether to retroactively apply the *Mapp* principles but where to draw the line. Miss Mapp's conviction was set aside as a consequence of the new interpretation. The pre-*Mapp* convictions of the petitioners in *Ker* v. *California* were scrutinized in terms of the new interpretation and found to be compatible therewith. See also *Fahy* v. *Connecticut*, -- U.S. -- (December 2, 1963). The search involved in the *Mapp* case occurred on May 23, 1957; the search involved in the instant case occurred on May 18, 1959. Appellee's trial, wherein the alleged illegally obtained evidence was admitted, occurred on October 8, 1959. The date of Miss Mapp's trial is not recited in either the opinion of the Supreme Court of Ohio or that of the United States Supreme Court. However, the Ohio Supreme Court affirmed Miss Mapp's conviction on

[7] *United States v. Walker, supra,* at 19.

March 23, 1960,[8] just over five months after appellee herein was tried. Between the time of Miss Mapp's trial and the Ohio Supreme Court's decision, an intermediate appeal was taken in the Ohio Court of Appeals[9] (unreported). We think it fair to say that Miss Mapp's trial probably occurred prior to Mr. Hurst's trial.

Of course the *Mapp, Ker* and *Fahy* decisions were made in direct review proceedings whereas the search and seizure issue here is presented by way of collateral attack in a habeas corpus proceeding. But the collateral nature of the instant proceeding does not provide a conclusive ground for denial of relief apart from the considerations advanced in opposition to general retroactive application of *Mapp*. *Brown v. Allen,* 344 U.S. 443 (1952). The posture of the case serves simply to underscore the policy consideration against upsetting final judgments. We must therefore ask whether the considerations disfavoring general retroactive application of *Mapp* persuade us to hold that although an illegal search in Ohio vested the victim in 1957 with a Constitutional privilege to exclude, ~~such~~ a search in California did not vest the victim with such a privilege in 1959, and that although a trial in Ohio in which illegally obtained evidence was admitted was Constitutionally vitiated, a later trial in California in which such evidence was admitted was not Constitutionally vitiated.

[8] 170 Ohio St. 427, 166 N.E. 2d 387 (1960).
[9] *Id.*

We agree that the underlying policy objective of the doctrine of exclusion is to deter. The doctrine of exclusion is nevertheless a Constitutional privilege of the victim, and its status as such is not altered by identification of its purpose.[10] Care must be taken to see that unjustifiable distinctions are not drawn between individuals in enforcing such a privilege. A commentator who disfavors general retroactive application of the *Mapp* principles has said:

> "It would not show too much concern for an orderly and fair transition from one Constitutional rule to another to hold *Mapp v. Ohio* applicable to all prisoners tried after Miss Mapp as well as to all prisoners, no matter when tried, in whose cases the admissibility of the evidence was pending on direct review when *Mapp* was decided." Bender, *The Retroactive Effect of an Overruling Constitutional Decision: Mapp v. Ohio,* 110 U. Pa. L. Rev. 540, 677 (1962).

The argument that "wholesale reversal of past convictions" will fail to further the purpose of deterrence leans heavily upon the premise that retroactive application of the principles of *Mapp* will lead inevitably to a "wholesale reversal of past convictions." *United States v. Walker, supra,* p. 19. We feel that in the

---

[10] *Mapp v. Ohio supra* at 656:

> "In short, the admission of the new constitutional right by *Wolf* could not consistently tolerate denial of its most important constitutional privilege, namely, the exclusion of the evidence which an accused had been forced to give by reason of the unlawful seizure. To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment."

context of the instant case the premise fails to support its burden. California criminal trials have, since 1955, been conducted in accordance with a judicially imposed exclusionary rule,[11] a fact which has repeatedly received commendation by the Supreme Court.[12] We are inclined to the belief that reversal of past California convictions will more likely be the exception rather than the rule of retroactive application of the *Mapp* principles. Appellants do not argue otherwise.

With respect to a flood of litigation resulting from retroactive application of *Mapp*, we agree with the sentiment expressed in the *Walker* case that the administrative burden placed upon courts is not a sufficient reason for denying relief since "prisoners as well as tort claimants have a right to crowd court dockets."[13] Moreover, we feel that relief should not be denied solely because "such litigation would fail to serve the purpose for which the right was created."[14] As was stated in *State v. Smith*, 37 N.J. 481, 483, 181 A. 2d 761, 762 (1962), "we seek essential justice both to the individual and to the community." If it were obvious that a substantial detriment to the community would obtain as a consequence of granting relief here, attendant with a failure to promote the underlying purpose of deterrence, we might justifiably hold a dif-

[11] *People v. Cahan*, 44 Cal.2d 434, 282 P.2d 905 (1955).
[12] See *Elkins v. United States*, *supra*, at 220; *Mapp v. Ohio*, *supra*, at 651-652; *Ker v. California*, *supra*, at 31.
[13] *United States v. Walker*, *supra*, at 19, n. 11.
[14] *Id.*

ferent view. But as stated above, we do not perceive such a detriment in the context of the instant case.[15]

The Supreme Court has not articulated guidelines for analyzing the retroactivity problems which are forming the wake of recent landmark interpretations of the Due Process Clause of the Fourteenth Amendment.[16] We can, perhaps, be guided by what the Court has actually done. *Eskridge v. Washington*, 357 U.S. 214 (1958) applied *Griffin* retroactively in a habeas corpus proceeding concerning a 1935 conviction. It has been said that the *Eskridge* case should not govern a case such as the instant one because the purpose of the rule in *Griffin* is to provide fairness in procedure[17] and is related to the actual guilt or innocence of the accused.[18] However, the exclusion of coerced confessions is predicated upon concepts of procedural fairness without regard to the verity or probity of the confession,[19] and therefore without regard to actual guilt

[15] In an appendix to the *Elkins* opinion, 364 U.S. at 224-225, the Supreme Court listed the states which had adopted by 1960 an exclusionary rule. From that list we note that of the states within the Ninth Circuit, Alaska, California, Hawaii, Idaho, Montana, Oregon and Washington exclude illegally seized evidence; Arizona and Nevada do not. The impact, if any, of our limited holding herein upon the practical administration of justice within the context of a similar case originating in one of the latter two states may be weighed if and when the occasion arises.

[16] E.g. *Griffin v. Illinois*, 351 U.S. 12 (1956); *Douglas v. California*, 372 U.S. 353 (1963); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

[17] *United States v. Walker*, *supra*, at 19.

[18] Traynor, *Mapp v. Ohio At Large In The Fifty States*, 1962 Duke L.J. 319, 340-41.

[19] *Rogers v. Richmond*, *supra* (1960).

or innocence of the accused. The Court in *Mapp* drew support for its decision from the coerced confession cases. For this reason, some question exists to what extent the *Mapp* exclusionary doctrine is based upon the guarantee deemed implicit in the Due Process Clause of an accusatorial criminal procedure.[20] It is noteworthy that in the area of coerced confessions the Supreme Court has given *sub silentio* retroactive effect to decisions setting forth new standards for judging the nature of coercion.[21]

Scant as these cases may seem as authority for our position, there is no Supreme Court precedent which compels a holding that a Supreme Court decision overruling a previous interpretation of the Due Process Clause of the Fourteenth Amendment does not apply retroactively. We hold that appellee is entitled

[20] *Mapp v. Ohio*, *supra*, at 656-657; and at 683 (dissenting opinion); *The Supreme Court, 1960 Term*, 75 Harv. L. Rev. 40, 155 (1961).

[21] *Reck v. Pate*, 367 U.S. 433 (1961). The district court had noted in that case that "Reck was convicted of this crime in 1936 and at *that* time the Due Process Clause was not violated by the circumstances surrounding the making of his confessions. Today, the Due Process Clause is violated [under subsequently announced criteria]." *United States ex rel. Reck v. Ragen*, 172 F. Supp. 734, 745 (N.D.Ill. 1959). The district court refused to apply retroactively the new standards for much the same reasons advanced in opposition to retroactive application of *Mapp*. The Seventh Circuit affirmed on the ground that the confession was voluntary. *United States ex rel. Reck v. Ragen*, 274 F.2d 250 (7th Cir. 1960). The Supreme Court reversed on the ground that under the standards of the *subsequent* cases, the confession was coerced. See Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 Yale L.J. 907, 939 n. 173; Note, *Collateral Attack of Pre-Mapp v. Ohio Convictions Based On Illegally Obtained Evidence in State Courts*, 16 Rutgers L.Rev. 587, 592 n. 32.

to the benefit of the doubt. So holding, we turn now to the merits of the matter.

At no time during the investigation did the officers have warrants for the arrest or search of either appellee or his codefendant, Anniece Jones. In the absence of exceptional circumstances to dispense with the need of a search warrant, search of the premises at 309 West 83rd Street was legal only if made incident to the lawful arrest of either appellee or Anniece Jones.[22] To be lawful, the arrest, in the absence of a warrant therefor, must have been made upon probable cause, which exists where the officers have reasonable grounds for belief that the person to be arrested had committed or was committing a crime.[23] If a search was conducted which was not incident to a lawful arrest, any discoveries made thereby, or searches which followed therefrom, fall within the "fruit of the poisonous tree" doctrine.[24]

The California District Court of Appeal found there to have been probable cause for the arrest of Anniece Jones, based upon the following combination of circumstances: the anonymous tip; the length of time elapsed before Anniece Jones answered Garrahan's knocks at the front door; the assumption that she had seen the officers; the observation by officer Grennan of her emptying an ashtray into a toilet and flushing it; and the observations made by officer Hanks concerning the package under the house which were communicated to

[22] *Cohen v. Norris*, 300 F.2d 24, 31-32 (9th Cir. 1962).
[23] *Ker v. California*, *supra*, at 34-35.
[24] *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920).

the other officers. The California District Court of Appeal recognized that each of these circumstances, considered in isolation, would be incapable of furnishing probable cause for the arrest of Anniece Jones, and that it was the combination of the officers' observations which justified reliance upon the information given by the unidentified informer.[25]

It is clear that the observations made by officers Grennan and Hanks are indispensable links in the chain of circumstances furnishing probable cause for the arrest of Anniece Jones. The California court did not conclude otherwise and we see no reason to assume otherwise for the sake of argument. If the observations of either or both of those officers constituted a "search", the search was clearly illegal. It is true that under California law a search preceding an arrest may be "incident" to a valid arrest if probable cause for the arrest exists at the time of the search.[26] However, we find no suggestion that California law sanctions a rule which would allow the fruits of a search to justify a later arrest, and at the same time allow the search to be justified by the arrest. Such a rule is, of course, incompatible with the Fourth Amendment.[27] We need not discuss the propriety of the California "search before arrest" doctrine since that doctrine does not confer legality upon a search which furnishes the requisite probable cause for the

[25] *Rodgers v. United States*, 267 F.2d 79 (9th Cir. 1959); *accord Willson v. Superior Court*, 46 Cal. 2d 291, 294 P.2d 36 (1956).
[26] *Willson v. Superior Court, supra.*
[27] *Johnson v. United States*, 333 U.S. 10 (1948).

subsequent arrest. We therefore feel that the critical issue is whether the activities of officers Grennan and Hanks constituted searches.

Upon arrival of the three officers at 309 West 83rd, officer Grennan repaired to the side of the residence. He had, in his words, "peered through a window which turned out to be the bathroom," at the time officer Garrahan knocked on the door. He remained at this vantage point and immediately after he heard officer Garrahan knock, he observed Anniece Jones enter the bathroom, empty something from an ash-tray into the toilet and flush it. At this point officer Grennan had knowledge only of the anonymous tip. Whereas officer Garrahan testified that he had seen Anniece Jones in the house as he approached the front door, the record is silent whether officer Grennan knew that anyone was inside when he went to the side of the house. If officer Grennan's bathroom observation was a search, there was clearly no probable cause at that time for the arrest of anyone.

We feel that officer Grennan's bathroom observations constituted an unlawful invasion of privacy to the same extent as occurred in *Brock v. United States*, 223 F. 2d 681 (5th Cir. 1955), where it was said, at page 685:

> "Whatever quibbles there may be as to where the curtilage begins and ends, clear it is that standing on a man's premises and looking into his bedroom window is a violation of his 'right to be let alone' as guaranteed by the Fourth Amendment."

Accord, see *Britt v. Superior Court*, 58 Cal. 2d 469, 472, 374 P. 2d 817 (1962).

The district court correctly pointed out that the "plain view" doctrine[28] does not exonerate the activities of officer Hanks. All that was in plain view was a large brown package about six inches inside the exposed vent hole. Upon reaching into the vent hole and removing the package he observed that the package consisted of two brown paper bags which covered two plastic bags which, in turn, covered a pillowcase. The officer then felt the *pillowcase* and noted the weedy, leafy feel of the contents. There can be no claim that the feeling of the pillowcase occurred in a "plain view" observation since the pillowcase itself was surrounded by four outer wrappings, all of which were rolled into a cylindrical shape. But only upon feeling the contents of the pillowcase did officer Hanks shout that he had "found the stuff."

Appellants take the position that "at this point in the factual development the information supplied by the informant had been sufficiently corroborated to constitute probable cause for the arrest of the co-defendant and the subsequent arrest of the appellee." Appellants' Brief p. 26. There is a suggestion in the California District Court of Appeal opinion that probable cause existed when officer Hanks *saw* the package under the house, but appellants do not press this point here. It cannot be gainsaid that the touching of the pillowcase and the tentative identification of its con-

[28] See, e.g. *Ker v. California*, *supra*.

tents were in fact steps which officer Hanks undertook prior to declaring that he had "found the stuff." Since he did not in fact make his declaration upon the bare visual observation of the package, we need not speculate whether he would have done so, or, if he had, whether a sufficient quantum of cause to be probable existed for the valid arrest of Anniece Jones.

Officer Hanks' activities constituted a search and seizure. The unconsented to entry upon the backyard of the premises was concededly a civil trespass. If officer Hanks had done no more, this fact would not be determinative without further facts tending to show the degree of privacy appellee enjoyed in that place. *Polk v. United States,* 291 F.2d 230 (9th Cir. 1961). But there was a further trespass when officer Hanks reached underneath the house itself in order to remove the package. That appellee is protected against such intrusion of his home is not open to question. *Silverman v. United States,* 365 U.S. 505 (1961). Appellants state: "A search implies a prying into hidden places for that which is concealed." We are unable to improve upon this statement in describing officer Hanks' discovery of "the stuff."

The order appealed from is affirmed.

(Endorsed) Opinion Filed December 19, 1963.

FRANK H. SCHMID, *Clerk.*

Docket Sacto. Bk. 62 Pg. 269
Entered by B.E.
Date 2-7-64
(Endorsed)
Filed Jan. 30, 1964
Frank H. Schmid, Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

PEOPLE OF THE STATE OF CALIFORNIA, *Appellant*, v. ARTHUR LEE HURST, *Appellee*.	No. 18,420

ORDER STAYING ISSUANCE OF MANDATE

Upon application of Honorable Stanley Mosk, Attorney General of California, counsel for the Appellant, and good cause therefor appearing, IT IS ORDERED that the issuance, under Rule 26 of the mandate of this Court in the above cause be, and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the Appellant herein, providing such petition is

filed in the clerk's office of the Supreme Court of the United States on or before March 16, 1964. In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

FREDERICK G. HAMLEY
United States Circuit Judge.

DATED: SAN FRANCISCO, CALIF.
January 30, 1964

We will prepare a certiorari record when directed to do so.

Attached is conformed copy of order entered in this cause on your application.

Will you please *notify all counsel* of such order immediately.

Thank you.

FRANK H. SCHMID, *Clerk*

Received
Attorney General
Dec. 26, 11 PM '63
Department of Justice
San Francisco Office

APPENDIX D

CALIFORNIA PENAL CODE § 836:

A peace officer may make an arrest in obedience to a warrant, or may without a warrant, arrest a person;

1. Whenever he has reasonable cause to believe that the person to be arrested has committed a public offense in his presence.

2. When a person arrested has committed a felony although not in his presence.

3. Whenever he has reasonable cause to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed.